RECENT DECISIONS.

BANKRUPTCY—RIGHT OF A CREDITOR HOLDING COLLATERAL. The plaintiff, a creditor of the assignor in bankruptcy, held collateral security. He tried to prove the debt and share ratably in the dividends, at the same time retaining the collateral. *Held*, he could not do so without crediting the value of the collateral. *Union & Planters Bank of Memphis* v. *Duncan* (Miss. 1904) 36 So. Rep. 690.

This case follows the bankruptcy rule as distinguished from the chancery rule. The latter compels no crediting of the collateral for a ratable sharing in the assets. The authorities are about evenly divided between these two rules. The bankruptcy rule finds justification in the fact that special laws must of necessity control in cases of bankruptcy. All creditors must suffer and the aim of the rule is to do away with all preferences and provide for the ratable distribution of assets. *Bank Comr's* v. *Security Trust Co.* (1900) 70 N. H. 536. But the chancery rule is founded on better reason. At law a secured creditor has a double right. He may look to his claim directly and in case a judgment against the debtor cannot be satisfied, he may resort to his collateral; or he may prefer to look to his collateral solely. *People* v. *Remington* (1890) 121 N. Y. 328. The mere fact of bankruptcy of the debtor ought not to deprive him of this right. *Merrill* v. *National Bank of Jacksonville* (1898) 173 U. S. 131.

CARRIERS—"NOTIFY SHIPMENT"—RIGHTS OF PARTY NOTIFIED. A railroad company refused to deliver perishable goods to a consignee in a "notify" shipment, because he would not pay excessive charges. In a suit by the consignee for injury caused to the goods by the delay, it was *held* he could recover in spite of the fact that at the time he demanded the goods the bill of lading had not been transferred to him by the bank to which it had been sent. *Clegg* v. *Southern R. R.* (N. C. 1904) 47 S. E. 667.

An action would lie against the carrier in favor of the bank on the facts of the principal case for wrongful delivery without production of the bill of lading. *Hirskell* v. *Farmers National Bank* (1879) 89 Pa. St., 155. Delivery in such case amounts to a conversion. *Furman* v. *R. R.* (1887) 106 N. Y. 579; *North Pa. R. R.* v. *Commercial Bank* (1887) 123 U. S. 627. The word "notify" implies that such a party is a stranger to the transaction until he receives title from the real consignee, the bank; for, otherwise, notice would be given to him without specific direction. Hutchinson on Carriers, 4th ed. §131 b. It is difficult, then, to see how his rights are violated by the refusal to deliver until he secures the indorsement of the bank, irrespective of whether the carrier knows that he does not hold the bill of lading.

CONFLICT OF LAWS—RIGHT OF ACTION UNDER FOREIGN STATUTE—EFFECT. The plaintiff's intestate was injured in Mexico, where a statute gave a right of action for death, but fixed the damages in the form of a pension. Suit was brought in Texas where a similar statute existed, but damages were provided for in a lump sum. *Held*, that as the Texas court could not assess the damages according to the Mexican statute, the court would not enforce the right. *Slater* v. *Mexican Nat. R. Co.* (1904) 194 U. S. 120. See NOTES, p. 503.

CONSTITUTIONAL LAW—FEDERAL COURTS—INTERPRETATION OF STATE STATUTES. Suit was brought in a federal court by citizens of Pennsylvania to enforce a mechanic's lien given by an Ohio statute. The materials were furnished before the Ohio Supreme Court had passed on the constitutionality of the statute. Subsequently, but before the institution of this suit, that court declared the statute repugnant to the Ohio constitution.

Held, the federal court should decide the constitutionality independently of the Ohio decision. *Great Southern Fire Proof Hotel Co.* v. *Jones* (1904) 193 U. S. 532.

In general the federal courts will follow the decisions of the state courts in interpreting statutes and constitutions. *Post* v. *Supervisors* (1881) 105 U. S. 667. Though originally federal courts followed the changes of opinion in the state courts, *Green* v. *Neal* (1832) 6 Pet. 291, it is now settled that they will not allow the rights of parties to be changed where relations were entered into on the basis of a former interpretation. *Douglass* v. *County of Pike* (1879) 101 U. S. 677. For similar reasons, it would seem, the federal courts will interpret according to their own opinion a statute unadjudicated upon when the rights of the parties were fixed, notwithstanding a contrary result reached in the meantime by the state court. *Burgess* v. *Seligman* (1882) 107 U. S. 20; *Anderson* v. *Santa Anna* (1886) 116 U. S. 356. The federal courts are reluctant to run counter to state decisions however, and, it would seem justly, for the result is to establish different rules of law for citizens of different states, a result directly contrary to the purpose of giving jurisdiction in cases of diverse citizenship. The principal case must depend on the doctrine that some sort of rights can be acquired under an unconstitutional statute, [see *United States* v. *Realty Co.* (1896) 163 U. S. 427] since decisions announced before the fixing of rights of parties will be followed. *Fairfield* v. *County of Gallatin* (1879) 100 U. S. 47, 52.

CONSTITUTIONAL LAW—IMPAIRMENT OF CONTRACT RIGHTS—PENSION ACT. The relator's husband was a member of the police force. By statute a portion of his salary was withheld so as to be used for a pension fund for his widow, if he died while serving the city. A statute subsequently destroyed this pension right. The relator's husband having since died, she attacks the statute and seeks to force the enrollment of her name on the pension list. *Held*, there was no vested right in relator, and the legislature impaired no contractual right of relator in withdrawing the right to the pension. *State* ex rel *Risch* v. *Board of Trustees of Policemens Pension Fund* (Wis. 1904) 98 N. W. 954.

An office is a creature of law and not a contract. *Butler et al.* v. *Pennsylvania* (1850) 10 How. 402. The legislature may increase or decrease the salary attached thereto or altogether destroy it without disturbing any contract right. *Comm.* v. *Bacon* (Pa. 1820) 6 S. & R. 320. Pension rights have been regarded by the courts in the same light. *Pennie* v. *Reis* (1889) 132 U. S. 464 Salary already earned has been held to give a quasi contractual right. That the legislature could not destroy, *Fisk* v. *Jefferson Police Jury* (1885) 116 U. S. 131, and conceivably, under the facts of the principal case, there should be a remedy on that theory. The courts seem to deny recovery as a matter of policy. See 1 COLUMBIA LAW REVIEW, 55†.

CONSTITUTIONAL LAW—JURISDICTION OF EXECUTIVE OFFICERS OVER CLAIMS OF CITIZENSHIP. Certain Chinese persons were denied admission to the United States by an immigration inspector under a United States statute giving him the power to exclude aliens. U. S. Comp. Stat. 1901 p. 1303. The statute also provided for appeal to a higher executive officer. After the decision of the inspector and without taking an appeal an attempt was made to obtain a writ of habeas corpus in the United States Court under plea of citizenship. *Held*, the federal courts will not interfere by habeas corpus, at least, until the remedy of appeal given by the statute has been exhausted. *United States* v. *Sing Tuck* (1904) 194 U. S. 161.

When this case arose in the circuit court, *In Re Sing Tuck* (C. C. N. D. N. Y. 1903) 126 Fed. 386, it was in effect held that the question of finally determining citizenship might be left in the hands of an executive officer. For criticism see 4 COLUMBIA LAW REVIEW 290. On appeal the Circuit Court of Appeals reversed the decision. *U. S.* v. *Sing Tuck* (C. C. A. 2nd C. 1904) 128 Fed. 592. See 4 COLUMBIA LAW REVIEW, 437. In reversing the decision of the latter court, the United States Supreme Court has not decided the right of an executive officer finally to determine

citizenship, for the narrow character of the prevailing opinion makes it authority only to the extent that before this question can come before the courts, the remedy allowed must be exhausted. The right of Congress to give an executive officer the power to determine citizenship in first instance is well settled. *Wong Wing* v. *U. S.* (1896) 163 U. S. 228, 235. The vital question as to the right of an executive officer to determine that matter finally is still open under the decision in the principal case.

CONSTITUTIONAL LAW—POLICE POWER—ACTS OF DISCRETION. The plaintiff applied for a writ of mandamus to compel the City Council of New Orleans to give him a bar-room license. The council refused the license on the ground that there were already enough bar-rooms in the neighborhood. *Held*, a writ of mandamus should be issued, for the refusal of the license is an arbitrary and unjust exercise of the police power. *State* ex rel. *Galle* v. *New Orleans* (La. 1904) 36 So. 999.

It lies within the police power of a state to regulate the liquor traffic, even to prohibiting it altogether. *Crowley* v. *Christensen* (1890) 137 U. S. 86. In the absence of express legislative authority the licensing board is vested with no discretion and so must issue a license to anyone complying with the statutory requirements. *City of Rome* v. *Duke* (1855) 19 Ga. 93; *Henry* v. *Barton* (1895) 107 Cal. 535. Where discretion is granted by the legislature, however, it cannot be arbitrarily exercised. *Appeal of Kelminski* (1894) 164 Pa. St. 231. But the decision of the licensing board must be the outcome of an examination and a consideration of the relevant facts as to the requirements of the public and the suitableness of the place. *U. S.* v. *Douglass* (1890) 19 D. C. 99; *Perry* v. *Salt Lake City* (1891) 7 Utah 143. If the board has acted in good faith, although its decision is apparently wrong the court will not interfere. *Lanck's Appeal* (1896) 2 Pa. Super. Ct. 53. While the refusal of a license to one applicant and the issuing of it to another, without a valid reason for the discrimination, is an abuse of discretion, Ex parte *Levy* (1884) 43 Ark. 42; *People* v. *Commissioners* (N. Y. 1893) 4 Misc. 330; a refusal on the ground that there are a sufficient number of licensed bar-rooms in the neighborhood is a sound exercise of discretion and a valid use of the police power. *People* v. *Board of Excise* (1891) 16 N. Y. Supp. 798; *Perry* v. *Salt Lake City*, supra; *Hillsboro* v. *Smith* (1892) 110 N. C. 417. *People* v. *Murray* (1895) 38 N. Y. Supp. 177.

CONSTITUTIONAL LAW—STARE DECISIS. The plaintiff in an action raised the question of the constitutionality of two statutory sections. These sections had previously been declared constitutional. *Held*, where statutes have been declared constitutional and rights have for an appreciable period been allowed to accrue thereunder, in the absence of commanding necessity, stare decisis will govern. *Walling* v. *Brown* (Idaho 1904) 76 Pac. 318.

The doctrine of stare decisis is primarily one of policy. There is a desire to have the law as stable as possible, so that it may be known and acted upon without fear of repeated changes. Decisions once given upon full argument, and after deliberation, are in general regarded as binding authority in the jurisdiction where they were handed down. See 3 *Har. L. Review*, 125. While it is true that vested interests should be disturbed as little as possible, and that consistency in the law is desirable, this should not, wherever it is reasonably possible to avoid it, be carried to the extent of consistency in error, where the principle of law on which the prior decision rests was falsely understood or applied.

CONTRACTS—LIABILITY OF THIRD PERSONS SIGNING. The plaintiff made an offer in writing to furnish machinery to "G. & Co.," such offer to be subject to the approval of the plaintiff's manager. The written acceptance was worded: "Your proposal as above is hereby accepted," signed "G. & Co. By S. S. G., W. B. G., T. H. G." W. B. G. was not an agent

for G. & Co. but signed the acceptance individually. *Held*, that by joining in the acceptance of the offer the defendant became a joint contractor, although the offer was not addressed to him. *Gill* v. *General Electric Co.* (C. C. 3rd C. 1904) 129 Fed. 349.

Several courts adopt the anomalous doctrine that where one not mentioned in the body of a simple contract signs his name thereto, he thereby makes himself a joint contractor; and this irrespective of whether the offer was made to him. *Clark* v. *Rawson* (1846) 2 Denio 135. *Staples* v. *Wheeler* (1854) 38 Me. 372. There can be no meeting of the minds where the offeror has not the acceptor in mind in making the offer. *Evans* v. *Conken* (1893) 24 N. Y. Supp. 1081; *Lancaster* v. *Roberts* (1893) 144 Ill. 213. The better view would be to regard him as surety, but in that case the consideration must be recited in order to satisfy the Statute of Frauds. *Gould* v. *Moring* (1858) 28 Barb. 444.

CONTRACTS—MARRIED WOMEN—EFFECT OF MARRIED WOMAN'S CONTRACT. The plaintiff, a married woman, sued the defendant land company for breach of a written contract to sell land. *Held*, though the contract was voidable at the plaintiff's election she might enforce it against the defendant. *Watkins Land Mortgage Co.* v. *Campbell* (Tex. 1904) 81 S. W. 560.

The prevailing doctrine is that where a married woman may by enabling acts acquire property by purchase, she may make a contract to purchase it. Though such contract is voidable at her election she may enforce it against the other party. *Johnson* v. *Jones* (1876) 51 Miss. 860. Where the enabling act is silent as to her right to contract in connection with her own estate there is no reason for departure from the common law. Bishop on the Law of Married Women, Vol. 2, § 235. If the court argues that the right to purchase property carries with it the right to contract for its purchase, it is placing a lax interpretation on the statute. If it does imply that right there is no ground, as in the case of an infant's contract, for declaring such contract not mutually binding. This doctrine would give great opportunity for fraud.

CRIMINAL LAW—BURDEN OF PROOF—INSANITY AS A DEFENCE. The defendant pleaded insanity to an indictment for murder. *Held*, he must prove insanity by a preponderance of the evidence. *State* v. *Clark* (Wash. 1904) 76 Pac. 98. See NOTES, p. 507.

EMINENT DOMAIN—INTEREST ACQUIRED—PRESUMPTION OF EASEMENT. A statute, authorizing condemnation proceedings, provided that after the appraisement of land and payment of the damages assessed therefor, the party condemning might "enter upon and take possession of the said land for the purposes aforesaid" [railroad purposes]. It also made the report of commissioners embodying these facts evidence of the right to "have, hold, use, occupy, possess and enjoy" the said land, the statute being otherwise silent as to the interest acquired. *Held*, the interest acquired was the corporeal fee and not an easement. *Currie* v. *New York T. Co.* (N. J. 1904) 58 Atl. 308.

The general rule is that, in the absence from the condemnation statute of the words "fee simple," "absolute title," or the like, an easement only is acquired. *Pittsburg & L. E. R. Co.* v. *Bruce* (1882) 102 Pa. St. 23; *R. Co.* v. *Telford's Ex'rs.* (1890) 89 Tenn. 293. And this is so although the statute provides for the payment of the value of the land. *Wash. Cemetery* v. *R. R.* (1877) 68 N. Y. 591; *Raleigh R. R. Co.* v. *Sturgeon* (1897) 120 N. C. 225. The same result has been reached even where the words "fee simple" were employed. *Kellogg* v. *Malin* (1872) 50 Mo. 496. While the extent of the interest condemned is in the exclusive discretion of the legislature, *Sweet* v. *Buffalo, N. Y. & P. R. Co.* (1879) 79 N. Y. 293, the intention of the legislature must still be determined by the court. The court in reaching the result in the principal case seems to have rejected a rule not only well settled but reasonable and proper.

EVIDENCE—CONSTITUTIONAL LAW—SELF INCRIMINATION. In a trial on a criminal charge, the state sought to prove the defendant's handwriting by introducing private papers obtained by unlawful search. The defendant objected to the admission of such papers in evidence on the ground that it would be unconstitutional in causing him to give testimony incriminating himself. Constitution of New York State, Sec. 6, Art. 1. *Held*, such evidence was admissible as it did not cause the defendant to testify against himself. *Adams* v. *People* (1904) 24 Sup. Ct. Rep. 372.

For a discussion of this case in the state court, which decision is here sustained, see 4 COLUMBIA LAW REVIEW 60.

EVIDENCE—CONFESSIONS COUPLED WITH EXCULPATORY STATEMENTS.—On a prosecution for murder the state introduced in evidence a statement by the defendant that "We had to do it to save ourselves." *Held*, such a statement is not a confession, since it denies the guilty intent. *Owens* v. *State* (Ga. 1904) 48 S. E. 21. See NOTES, p. 505.

INSURANCE—FORFEITURE—FELONY. A husband took out an insurance policy, providing that the proceeds should be payable to his wife in case she survived him, and if not, to his administrators. He assigned the policy to his wife and afterwards he murdered her, before killing himself. Both the administrators of the husband and those of the wife claimed the insurance money. *Held*, that as the husband's estate could not be allowed to benefit by his crime, the wife's administrator was entitled to the insurance. *Box* v. *Lanier* (Tenn. 1904) 79 S. W. 1042.

On the theory that to deprive one of property, obtained indirectly through crime, would be to enforce other punishment than prescribed by law, recovery has been allowed in such cases. *Owens* v. *Owens* (1888) 100 N. C. 240; *Shellenberger* v. *Ransom* (1894) 41 Neb. 631; *James Carpenter's Estate* (1895) 170 Pa. St. 203. As against this theory is *Riggs* v. *Palmer* (1889) 115 N. Y. 506 and a dictum in *Mutual Life Ins. Co.* v. *Armstrong* (1885) 117 U. S. 591. The Riggs case, however, seemed to turn on an implied condition read into the statute of descent. When the constitutional provision providing against forfeitures is considered the former doctrine seems the sounder. Cooley's Constitutional Limitations (7th ed.) p. 368.

INSURANCE - INSURABLE INTEREST—DIVORCE. One having a life insurance policy payable to himself, his assigns, etc., or to his mother, her assigns, etc., assigned the policy to his wife after his marriage, with his mother's consent. Subsequently, there having been a divorce, both he and his wife claimed the insurance. *Held*, the wife had a lien on the policy to the amount of the premiums paid by her, but as her insurable interest had ceased, she had no right to the insurance. *Hatch* v. *Hatch* (Tex. 1904) 80 S. W. 411.

This jurisdiction is in the minority in requiring an assignee of an insurance policy to have an insurable interest. *Schonfield* v. *Turner* (1889) 75 Tex. 324; *Mutual Life Insurance Co.* v. *Allen* (1884) 138 Mass. 24; May on Insurance, § 3984. Insurable interest is necessary only at the inception to prevent wagering, since life insurance is not a contract of indemnity. *Rank* v. *Am. Mut. Life Ins. Co.* (1863) 27 N. Y. 282; *Dalby* v. *India Ins. Co.* 15 C. B. 304. Since such interest existed in the principal case at the inception of the contract and at the time of assignment, there is no reason to deprive the wife of its benefits because that interest ceased on divorce. *Conn. Mut. Life Ins. Co.* v. *Schaefer* (1876), 94 U. S. 457.

PLEADING AND PRACTICE—JUDGMENT AFTER DEATH OF A PARTY—COLLATERAL ATTACK. In an action of trespass to try land title, the plaintiff claimed that a former adjudication in favor of the present defendant was void, on the ground that one of the parties to the suit had died before judgment was rendered. *Held*, where jurisdiction has been acquired over a party to a suit, a judgment rendered against him after his death is

not void and cannot be attacked collaterally. *Campbell* v. *Upson* (Tex. 1904) 81 S. W. 358.

A judgment rendered against a person dying after the action has begun is not void on that account. *New Orleans* v. *Gaines Admrs.* (1890) 138 U. S. 595; *Mitchell* v. *Schoonover* (1888) 16 Or. 311. It is an irregularity and may be attacked directly, but the judgment is valid until set aside by the court. *Stocking* v. *Hanson* (1876) 22 Minn. 542; *Giddings* v. *Steebe* (1886) 28 Tex. 732. Black on Judgments, 2nd ed., § 199. The contrary view, that in the absence of any statutory provision on the subject, a judgment against a dead person, either natural or artificial, is absolutely void, irrespective of whether jurisdiction has been acquired or not, has some support. *Life Ass'n.* v. *Fassett* (1882) 102 Ill. 315.

QUASI CONTRACTS—CHATTEL MORTGAGE—RIGHTS OF MORTGAGEE. A commission merchant received cattle which were subject to a recorded mortgage. Upon their sale, the proceeds were paid by the merchant to the mortgagor. *Held*, though the defendant was a mere agent who received no benefit, he is liable in a quasi contract action upon waiver of the tort. *Greer* v. *Newland* (Kas. 1904) 77 Pac. 98.

The principal case shows the limitations of the doctrine of unjust enrichment in quasi-contract. It is said, "If no benefit accrues to the tort-feasor by reason of the tort committed, assumpsit will not lie." 15 Amer. & Eng. Encyc. of Law 2nd ed., 1115; Keener on Quasi-Contracts, Ch. 3; *Fanson* v. *Linsley* (1878) 20 Kan. 235 In this case the defendant was not enriched, nor did he have property of the plaintiff's which it was against good conscience to retain. Cases of this kind to be sustainable must rest upon another theory—that of a duty from which the law implies a contract. *Hindmarch* v. *Hoffman* (1889) 127 Pa. St. 284.

REAL PROPERTY—EASEMENT BY PRESCRIPTION—LICENSES. A railroad company entered upon lands with the consent of the owners and operated its railroad thereon continuously for 40 years. The owners then denied the right of the company to use the land. In a suit by the railroad to restrain interference on the part of the owner it was *held*, the railroad acquired a right of way by prescription. *Louisville & N. R. Co.* v. *Smith* (C. C. A., 5th Circ. 1904) 128 Fed. 1.

A license is a mere personal privilege revocable at will. *Lawrence* v. *Springer* (1892) 49 N. J. Eq. 289; *Crosdale* v. *Lanigan* (1892) 129 N. Y. 604. It passes no interest or estate in land; *Minneapolis Mill Co.* v. *Railroad* (1892) 51 Minn. 304; *Lehigh Valley R. R. Co.* v. *McFarlan.* (1881) 43 N. J. L. 605. The fact that the user originated in license or permission negatives the idea of the presumed grant, or adverse possession. The prescription period, therefore, would not begin to run until a revocation or repudiation of the license. Nor should there be an exception, in the case of railroads, on the grounds of public policy, such as would justify this case. A railroad may always obtain an easement of way by condemnation proceedings. In some states, a railroad may by statute convert into condemnation proceedings an action of ejectment brought against it by the licensor who has revoked the license—Jones on Easements, §§ 71 and 72.

REAL PROPERTY—FIXTURES—RAILS—ON RAILROAD'S RIGHT OF WAY. The plaintiff, a railroad company, having abandoned its right of way, sought to enjoin the servient tenant's vendee from removing the rails. *Held*, the injunction would not be granted, as the title to the rails, which were real property, rested in the owner of the fee upon the abandonment. *Missouri Pac. Ry. Co.* v. *Bradbury* (Mo. 1904) 79 S. W. 966.

At common law, anything attached to the realty became a part thereof. *Henry's Case* (1505) Year Book 20 Henry VII. 13 pl 24; *Richardson* v. *Copeland* (Mass 1856) 6 Gray 536. This rule has been modified, however, to meet modern business demands, and "trade fixtures" may be removed by the tenant as personality any time before the expiration

of his term. *Thrusher* v. *Water Works Co.* (1824) 2 B & C 608; *Lowe* v. *Brown* (1872) 22 Oh. St. 463. Under the tests of permanency, intention to improve the land permanently for the use contemplated, together with the fact of abandonment, the result reached on the principal case would be justified. *Van Keuren* v. *R. R.* (1875) 38 N. J. 165; *Hunt* v. *Iron Co.* (1867) 97 Mass. 279; contra, *Wagner* v. *R. R.* (1872) 22 Oh. St. 563. Sec. 2 COLUMBIA LAW REVIEW 407.

REAL PROPERTY—HIGHWAYS—RIGHT TO USE PERCOLATING WATERS TO SPRINKLE STREETS. The defendants, road commissioners, bored a well on a highway for the purpose of getting water to sprinkle the streets. The plaintiffs, abutting owners, seek to enjoin such action. *Held*, the highway easement does not justify the defendant's acts. *Wright* v. *Austin* (Cal. 1904) 76 Pac. 1023.

There seems to be no authority on the precise point. The waters of a spring rising in the highway may not be diverted to a watering trough, *Suffield* v. *Hathaway* (1877) 44 Conn. 521, and where a highway crosses a stream, the public may be kept from the stream, where it is of no use for highway purposes. *Old Town* v. *Dooley* (1876) 81 Ill. 255. It is the general rule that soil may be used to the extent of taking from one place on the highways to another if for the improvement of both places. *Robert* v. *Sadler* (1887) 104 N. Y., 229; *New Haven* v. *Sargent* (1871) 38 Conn. 50. As to whether trees growing on the highway may be used the authorities are in conflict. *Felch* v. *Gilman* (1849) 22 Vt. 38; *Tucker* v. *Eldred* (1860) 6 R. I. 404. It would seem that there is no necessary distinction between water and other things within the highway. The question in each case should be determined rather by the usefulness to the public than by the position of the abutting owner, and the court might without violence to the plaintiff's rights have refused the injunction.

REAL PROPERTY—NUISANCE—BLASTING. The defendants worked a stone quarry on their land in a city and by means of the concussion of earth and air, injured plaintiff's house, though using all care. *Held*, since defendants' use of their land for a quarry was an extraordinary use and the blasting extended over a long period of time, plaintiff may recover. *Longtin* v. *Persells* (Mont. 1904) 76 Pac. 699.

The preponderance of authority seems to be that for injuries caused by concussion where care is used the test is whether the defendant is making a reasonable use of his land. Where this is the case, there is no recovery; *Booth* v. *Rome, etc., R. Co.* (1893) 140 N. Y. 267; *Simon* v. *Henry* (N. J. 1898) 41 Atl. 692, while if the use is unreasonable, the defendant is liable; *Cotton* v. *Onderdonk* (1886) 69 Cal. 155. It has been held, apparently, that liability will attach regardless of reasonableness. *The FitzSimmons & Connell Co.* v. *Braun* (1902) 199 Ill. 390. It would seem that where such serious injury as the demolition of adjoining houses is caused, the question of reasonable use by defendant should not be considered.

REAL PROPERTY—SURFACE WATERS—REPULSION AND OBSTRUCTION. The defendants built bunkers on their land and thereby caused surface waters, already come within their boundaries, to be deflected off and upon the adjoining land of the complainant. *Held*, upon bill to enjoin defendants, that no right of action arose. *Sullivan* v. *Browning* (N. J. 1904) 58 Atl. 302. See NOTES, p. 506.

REAL PROPERTY—WASTE—RIGHTS OF LIFE TENANT. A tenant for life brought an action against his sub-tenant for waste committed in cutting down and appropriating growing timber, claiming damages for injury done the inheritance. *Held*, a tenant for life is entitled to recover such damages as the statute giving to the remainderman a right of action against third parties for waste to the inheritance does not take from the life tenant the right to recover therefor. *Dix* v. *Jaquay* (1904) 88 N. Y. Supp. 228.

The court rejects the doctrine of *Wood* v. *Griffin* (1865) 46 N. H. 230 and *Cal. Drydock Co.* v. *Armstrong* (1883) 17 Fed. 216, where, on a similar state of facts, the recovery of the life tenant was made dependent upon his having first satisfied the claim of the remainderman. A tenant being absolutely liable to the remainderman for injury to the inheritance, though committed by a stranger, he should not be required to satisfy the liability and then take his chance of reimbursement from the wrong-doer. *Cook* v. *Champlain Trans. Co.* (1845) 1 Denio 91. The law will allow a recovery where the mere liability has been incurred. *Reynolds* v. *City of Niagara Falls* (1894) 81 Hun 353.

A recovery by the tenant for life would be a bar to a separate action by the remainderman, as in the case of a bailee recovering for injury to property in his possession. *Woodman* v. *Nottingham* (1870) 49 N. H. 387. A common carrier also has an action against a wrong-doer for injury done goods in his possession and may recover the entire value holding it in trust for the owner. *Merrick* v. *Brainard* (1860) 38 Barb. 574.

TORTS—COMPENSATORY DAMAGE FOR ABUSIVE LANGUAGE OF CONDUCTOR. The plaintiff, a passenger on a street car, gave the conductor a quarter and, not getting change, asked for it, but the conductor, refusing to return the change, called her "dead beat" and "swindler." In an action against the street railway company, it was *held*, that compensatory damages may be had for injury to the plaintiff's feelings. *Gillespie* v. *Brooklyn Heights R. Co.* (1904) 178 N. Y. 347.

The decision in *Mitchell* v. *Rochester Ry. Co.* (1896) 151 N. Y. 107, was that injury to feelings consequent upon a neglectful act did not give rise to a cause of action, but here the breach of the carrier's duty to protect its passengers created the right of action, and the question is as to the measure of damages. On principle there seems to be no good reason why the injury to feelings should not enter into the measure of damages. 1 COLUMBIA LAW REVIEW 327, 483. Since there was no wilful tort by the railway company, the damages could be only compensatory, but what will be compensation must be estimated by the jury as best they can. *Wadsworth* v. *Telegraph Co.* (1888) 86 Tenn. 695, 711.

TORTS—MALICIOUS PROSECUTION—CIVIL ACTION. In a suit against the respondents for malicious prosecution of a civil action in which neither the person nor the property of appellant were interfered with it was *held*, such an action will not lie. *Abbott* v. *Thorne* (Wash. 1904) 76 Pac. 302.

The jurisdictions in this country appear to be about evenly divided upon this question. Georgia, Iowa, Maryland, North Carolina, New Jersey, New York, Ohio, Pennsylvania, Texas, Washington and Wisconsin have adopted the English rule holding that the assessment of costs against an unsuccessful plaintiff in such an action is sufficient compensation for the injury suffered by the defendant. Such states ignore the important difference between the fixed statutory costs prevailing in this country and the more liberal and flexible English rule leaving the assessment of costs largely to the discretion of the court. 2 COLUMBIA LAW REVIEW 124, 3 Id. 479, 498. On the other hand, California, Colorado, Connecticut, Indiana, Illinois, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Tennessee and Vermont permit a recovery where it can be shown that the suit complained of, was brought maliciously and without probable cause. For the historical development of this see *Kolka* v. *Jones* (1897) 6 N. D. 461.

TRUSTS—SAVING BANK DEPOSIT IN TRUST WITH NO NOTICE TO THE BENEFICIARY. A deposited money in a savings bank in trust for a named beneficiary, to whom no notice of the trust was given. Later A drew the money out. After the death of A the beneficiary sued on the ground that an irrevocable trust had been established. *Held*, the deposit was a tentative trust, revocable at will until some further unequivocal act were done. In re *Totten* (N. Y. 1904) 71 N. E. 748. See NOTES, p. 502.